

ALEXANDER F. STUART - 96141
 WILLOUGHBY, STUART & BENING, INC.
 50 W. San Fernando St., Suite 400
 San Jose, California 95113
 (408) 289-1972
 Facsimile: (408) 295-6375

Attorneys for Defendant
 LIBERTY MUTUAL FIRE INSURANCE
 COMPANY

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

LENSCRAFTERS, INC. AND EYEXAM
 OF CALIFORNIA, INC.,

Plaintiff,

vs.

LIBERTY MUTUAL FIRE INSURANCE
 CO.; EXECUTIVE RISK SPECIALTY INS.
 CO.; UNITED STATES FIRE INS. CO.;
 MARKEL AMERICAN INS. CO.; AND
 WESCHESTER FIRE INS. CO.,

Defendants.

No. C-07-2853 SBA

**ANSWER OF LIBERTY MUTUAL FIRE
 INSURANCE COMPANY TO
 COMPLAINT**

DEMAND FOR JURY TRIAL

Defendant Liberty Mutual Fire Insurance Company ("Liberty") answers Plaintiffs'

Complaint as follows:

INTRODUCTION

1. Liberty admits that it sold insurance policies naming Plaintiffs as insureds, and that such policies include a duty to indemnify, but only with respect to covered damages and only where certain conditions are met. Liberty denies that all material terms of its policies are alleged in the Complaint. Liberty lacks sufficient information or belief as to the truth of the remaining allegations of Paragraph 1 of the Complaint, and on that basis denies each and every allegation contained therein.

2. Liberty admits that Plaintiffs have been sued in the *Snow* Action, and that Plaintiffs

1 brought Case No. C 04-1001 SBA against Liberty in 2004 concerning insurance coverage for the
2 *Snow* Action. Liberty further admits that the trial court ruled in Case No. C 04-1001 SBA that two
3 of Plaintiffs' insurers had a duty to defend the *Snow* Action. Liberty further admits that Case No. C
4 04-1001 SBA did not resolve the duty to indemnify the *Snow* Action. Liberty lacks sufficient
5 information or belief as to the truth of the remaining allegations of Paragraph 2 of the Complaint,
6 and on that basis denies each and every allegation contained therein.

7 3. Liberty admits that some parties are presently involved in mediation through which
8 they are attempting to reach a settlement. Liberty objects to each and every allegation of Paragraph
9 3 which purports to disclose communications made in the course of such mediation, which
10 communications are confidential and privileged under California law, and on that basis denies all
11 such allegations. Liberty lacks sufficient information or belief as to the truth of the remaining
12 allegations of Paragraph 3 of the Complaint, and on that basis denies each and every allegation
13 contained therein.

14 4. Liberty admits that there is a dispute between Plaintiffs and its insurers concerning
15 the duty to indemnify Plaintiffs with respect to the *Snow* Action, but denies that the dispute is an
16 actual justiciable controversy at this time. Liberty denies that any insurer acknowledges that one or
17 more insurers owes a duty to indemnify the *Snow* Action, and on that basis denies that there is a
18 dispute among the insurers as to which insurer(s) must indemnify. Liberty lacks sufficient
19 information or belief as to the truth of the remaining allegations of Paragraph 4 of the Complaint,
20 and on that basis denies each and every allegation contained therein.

21 THE PARTIES

22 5. Liberty admits on information and belief the allegations of Paragraph 5 of the
23 Complaint.

24 6. Liberty admits on information and belief the allegations of Paragraph 6 of the
25 Complaint.

26 7. Liberty admits the allegations of Paragraph 7 of the Complaint.

27 8. Liberty lacks sufficient information or belief as to the truth of the allegations of
28 Paragraph 8 of the Complaint, and on that basis denies each and every allegation contained therein.

9. Liberty lacks sufficient information or belief as to the truth of the allegations of Paragraph 9 of the Complaint, and on that basis denies each and every allegation contained therein.

10. Liberty lacks sufficient information or belief as to the truth of the allegations of Paragraph 10 of the Complaint, and on that basis denies each and every allegation contained therein.

11. Liberty lacks sufficient information or belief as to the truth of the allegations of Paragraph 11 of the Complaint, and on that basis denies each and every allegation contained therein.

JURISDICTION

12. Liberty denies there is an actual justiciable controversy within the meaning of 28 U.S.C. § 2201. Liberty lacks sufficient information or belief as to the truth of the remaining allegations of Paragraph 12 of the Complaint, and on that basis denies each and every allegation contained therein.

13. Liberty admits that venue is proper in the Northern District of California once the dispute between Plaintiffs and its insurers ripens into an actual justiciable controversy. Liberty denies that it is proper to bring an action to declare the duty to indemnify before the *Snow* Action has resolved by court-approved settlement or judgment.

FACTUAL ALLEGATIONS

14. Liberty admits that it issued policies of insurance naming Plaintiffs as insured. Liberty denies that all material terms of its policies are alleged in the Complaint. Liberty lacks sufficient information or belief as to the truth of the remaining allegations of Paragraph 14 of the Complaint, and on that basis denies each and every allegation contained therein.

15. Liberty denies that Plaintiffs have complied with all terms and conditions precedent of Liberty's policies with respect to the duty to indemnify, and denies that Plaintiffs are entitled to the benefit of indemnity prior to the entry of a court-approved settlement or judgment in the *Snow* Action. Liberty lacks sufficient information or belief as to the truth of the remaining allegations of Paragraph 15 of the Complaint, and on that basis denies each and every allegation contained therein.

16. Liberty admits that it issued the referenced policies (collectively "Liberty Mutual Policies") naming Plaintiffs as insureds. Except as admitted herein, Liberty denies each and every allegation contained in Paragraph 16 of the Complaint.

1 17. Liberty admits that LensCrafters, Inc. and EYEXAM are each a named insured
2 under the Liberty Mutual Policies. The remaining allegations of Paragraph 17 of the Complaint are
3 incomplete with respect to the material terms of the Liberty Mutual Policies, which policies speak
4 for themselves, and which the court is respectfully invited to read for their contents. Liberty admits
5 that the Liberty Mutual Policies include a provision that Liberty will pay those sums that the insured
6 becomes legally obligated to pay as damages because of "personal injury," but only with respect to
7 "personal injury" covered by its policies and only where certain conditions are met. Liberty further
8 admits that the term "personal injury" is defined to include injury arising out of the oral or written
9 publication of material that violates a person's right of privacy. Liberty also admits that each of its
10 policies has a limit of liability of \$3 million for each occurrence, but subject to a non-cumulation of
11 limits provision, and that each of its policies has an aggregate limit of \$6 million. Except as
12 admitted herein, Liberty denies each and every allegation contained in Paragraph 17 of the
13 Complaint.

14 18. Liberty admits on information and belief the allegations of Paragraph 18 of the
15 Complaint.

16 19. Liberty admits on information and belief the allegations of Paragraph 19 of the
17 Complaint.

18 20. Liberty admits on information and belief that U.S. Fire issued umbrella policies for
19 the alleged policy periods. Liberty lacks sufficient information or belief as to the truth of the remaining
20 allegations of Paragraph 20 of the Complaint, and on that basis denies each and every allegation
21 contained therein.

22 21. Liberty admits on information and belief that the U.S. Fire policies each contain \$25
23 million policy limits. Liberty lacks sufficient information or belief as to the truth of the remaining
24 allegations of Paragraph 21 of the Complaint, and on that basis denies each and every allegation
25 contained therein.

26 22. Liberty admits on information and belief that Markel issued an umbrella policy for
27 the alleged policy period. Liberty lacks sufficient information or belief as to the truth of the remaining
28 allegations of Paragraph 22 of the Complaint, and on that basis denies each and every allegation

1 contained therein.

2 23. Liberty admits on information and belief that the Markel policy contains a \$15
3 million policy limit. Liberty lacks sufficient information or belief as to the truth of the remaining
4 allegations of Paragraph 23 of the Complaint, and on that basis denies each and every allegation
5 contained therein.

6 24. Liberty admits on information and belief that Westchester issued an excess umbrella
7 policy for the alleged policy period and that the excess umbrella policy contains a \$10 million policy
8 limit. Liberty lacks sufficient information or belief as to the truth of the remaining allegations of
9 Paragraph 24 of the Complaint, and on that basis denies each and every allegation contained therein.

10 25. Liberty admits on information and belief that Westchester issued umbrella policies
11 for the alleged policy period. Liberty lacks sufficient information or belief as to the truth of the
12 remaining allegations of Paragraph 25 of the Complaint, and on that basis denies each and every
13 allegation contained therein.

14 26. Liberty admits on information and belief that the Westchester umbrella policies each
15 contain \$25 million policy limits. Liberty lacks sufficient information or belief as to the truth of the
16 remaining allegations of Paragraph 26 of the Complaint, and on that basis denies each and every
17 allegation contained therein.

18 27. Liberty admits the allegations of Paragraph 27 of the Complaint, except for the last
19 sentence. Liberty admits that LensCrafters, Inc. and EYEXAM are defendants in the *Snow* Action, but
20 denies that they are the only defendants at present.

21 28. Liberty admits that the current operative complaint in the *Snow* Action includes
22 allegations that Plaintiffs disclosed private medical information of the putative plaintiff class in violation
23 of the Confidentiality of Medical Information Act, and that the purported disclosure is alleged to have
24 occurred during the periods of the Defendants' policies. Except as admitted herein, Liberty denies each
25 and every allegation of Paragraph 28 of the Complaint.

26 29. Liberty admits that Plaintiffs gave timely notice of the *Snow* Action to the
27 Defendants, that Plaintiffs requested that Liberty and ERSIC defend the *Snow* Action, that Liberty and
28 ERSIC agreed to pay certain defense costs under reservation of rights, and that both insurers contended

1 they had no duty to defend. Except as admitted herein, Liberty denies each and every allegation of
2 Paragraph 29 of the Complaint.

3 30. Liberty admits the allegations of Paragraph 30 of the Complaint.

4 31. Liberty admits that the trial court in Case No. C 04-1001 SBA ruled that both Liberty
5 and ERSIC owed a duty to defend the *Snow* Action. The contents of the Court's order speak for
6 themselves, and the court is respectfully invited to read the order for its contents. Liberty denies each
7 allegation of Paragraph 31 of the Complaint that is contrary to the contents of the order. Except as
8 admitted herein, Liberty denies each and every allegation of Paragraph 31 of the Complaint.

9 32. Liberty admits that Plaintiffs' claims for indemnity in Case No. C 04-1001 SBA were
10 dismissed without prejudice, by stipulation of the parties, on grounds that they were unripe for
11 adjudication at that time. The remaining allegations of Paragraph 32 of the Complaint fail to completely
12 set forth the terms of the stipulation and order, although Liberty admits that any party to the stipulation
13 could file a new action to adjudicate the dismissed claims once they became ripe, and that such action
14 must be filed in the Federal District Court for the Northern District of California. Except as admitted
15 herein, Liberty denies each and every allegation of Paragraph 32 of the Complaint.

16 33. Liberty admits that the trial court in Case No. C 04-1001 SBA entered an Amended
17 Judgment on November 22, 2005 declaring, among other things, that Liberty and ERSIC owed a duty
18 to defend the *Snow* Action. Liberty further admits that it has appealed from that judgment, and that the
19 appeal is currently pending before the Ninth Circuit. Except as admitted herein, Liberty denies each and
20 every allegation of Paragraph 33 of the Complaint.

21 34. Liberty admits that the parties to the *Snow* Action are presently involved in
22 settlement discussions and mediation sessions in which they are trying to settle the action. Liberty lacks
23 sufficient information or belief as to the truth of the remaining allegations of Paragraph 34 of the
24 Complaint, and on that basis denies each and every allegation contained therein.

25 35. Liberty admits that it has raised coverage defenses with respect to the duty to
26 indemnify the *Snow* Action. Liberty objects to each and every allegation of Paragraph 35 of the
27 Complaint which purports to disclose communications made in the course of mediation, which
28 communications are confidential and privileged under California law, and on that basis denies all such

1 allegations. Liberty lacks sufficient information or belief as to the truth of the remaining allegations
2 of Paragraph 35 of the Complaint, and on that basis denies each and every allegation contained therein.

3 36. Liberty denies each and every allegation of Paragraph 36 of the Complaint on
4 grounds that there is not a present justiciable controversy with respect to the duty to indemnify Plaintiffs
5 with respect to the *Snow* Action.

6 **FIRST CLAIM FOR RELIEF**
7 **DECLARATORY JUDGMENT RE DEFENDANTS' DUTY TO INDEMNIFY**

8 37. Liberty repeats and incorporates its responses to Paragraphs 1 through 36 of the
9 Complaint.

10 38. Liberty denies each and every allegation of Paragraph 38 of the Complaint as it
11 relates to Liberty and the Liberty Mutual Policies. Liberty lacks sufficient information or belief as to
12 the truth of the remaining allegations of Paragraph 38 of the Complaint, and on that basis denies each
13 and every allegation contained therein.

14 39. Liberty objects to each and every allegation of Paragraph 39 which purports to
15 disclose communications made in the course of mediation, which communications are confidential and
16 privileged under California law, and on that basis denies such allegations, and further denies that
17 Plaintiffs are entitled to any of the declarations sought. Liberty lacks sufficient information or belief
18 as to the truth of the remaining allegations of Paragraph 39 of the Complaint, and on that basis denies
19 each and every allegation contained therein.

20 40. Liberty denies each and every allegation of Paragraph 40 of the Complaint.

21 **FIRST AFFIRMATIVE DEFENSE**

22 41. The Complaint fails to state a claim against Liberty upon which relief can be granted.

23 **SECOND AFFIRMATIVE DEFENSE**

24 42. The claims asserted in the Complaint are barred, in whole or in part, by the terms,
25 conditions, provisions and exclusions in the Liberty Mutual Policies.

26 **THIRD AFFIRMATIVE DEFENSE**

27 43. There presently is no justiciable controversy between Plaintiffs and any Defendant
28 with respect to the duty to indemnify either Plaintiff in the *Snow* Action, and on that basis this action

1 should be dismissed for lack of ripeness.

2 **FOURTH AFFIRMATIVE DEFENSE**

3 44. Liberty has no obligation under any of the Liberty Mutual Policies to the extent that
4 the insureds under such policies have voluntarily made payments, assumed obligations or incurred
5 expenses without prior approval by Liberty.

6 **FIFTH AFFIRMATIVE DEFENSE**

7 45. Each of the applicable Liberty policies, if any, contains a non-cumulation of limits
8 provision. This provision limits the total recovery of the insureds under all of the applicable Liberty
9 policies, if any, to no more than one per occurrence limit, or \$3 million, for any one given occurrence,
10 regardless of how many policies are triggered by that one occurrence.

11 **SIXTH AFFIRMATIVE DEFENSE**

12 46. The claims asserted in the *Snow* Action constitute no more than one “occurrence” as
13 that term is defined in the applicable Liberty policies.

14 **SEVENTH AFFIRMATIVE DEFENSE**

15 47. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to
16 the extent that the relief sought in the *Snow* Action does not constitute “damages” as that term is used
17 in the Liberty Mutual Policies.

18 **EIGHTH AFFIRMATIVE DEFENSE**

19 48. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to
20 the extent that any damages awarded to the plaintiffs in the *Snow* Action do not compensate an injury
21 arising from the violation of the Confidentiality of Medical Information Act.

22 **NINTH AFFIRMATIVE DEFENSE**

23 49. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to
24 the extent that any damages awarded to the plaintiffs in the *Snow* Action do not compensate an injury
25 arising from the publication of material that violates a person’s right of privacy.

26 **TENTH AFFIRMATIVE DEFENSE**

27 50. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to
28 the extent that liability is imposed in the *Snow* Action for an injury that was not fortuitous.

ELEVENTH AFFIRMATIVE DEFENSE

51. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to the extent that any injury was expected by the insured when it violated the Confidentiality of Medical Information Act.

TWELFTH AFFIRMATIVE DEFENSE

52. The claims asserted in the Complaint are barred, in whole or in part, by the doctrines of waiver and estoppel.

THIRTEENTH AFFIRMATIVE DEFENSE

53. Liberty has no obligation to indemnify in excess of the applicable limit of the applicable Liberty policies, if any, and therefore Liberty can have no obligation to indemnify any legal liabilities to pay damages in excess of such limit. Even if it is determined that other insurers breached an opportunity to settle within the collective (primary and excess) limits of insurance available to Plaintiffs, Liberty's obligation to indemnify can be no greater than the amount of the applicable limit of its applicable policies.

FOURTEENTH AFFIRMATIVE DEFENSE

54. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to the extent that any damages awarded to the plaintiffs in the *Snow* Action arise from electronic publication of material.

FIFTEENTH AFFIRMATIVE DEFENSE

55. Liberty has no obligation to indemnify under any of the Liberty Mutual Policies to the extent that any relief awarded to the plaintiffs in the *Snow* Action includes punitive damages, fines and/or penalties.

SIXTEENTH AFFIRMATIVE DEFENSE

56. Liberty reserves the right to assert additional defenses which cannot now be asserted due to incompleteness of Plaintiffs' allegations and/or the lack of discovery on the issues raised in the Complaint. Liberty does not waive any defenses to coverage under the Liberty Mutual Policies or applicable law.

WHEREFORE, Liberty prays for judgment as follows:

- 1 1. That the Court enter judgment in favor of Liberty and against Plaintiffs, and each of
- 2 them;
- 3 2. That Plaintiffs take nothing by their Complaint against Liberty;
- 4 3. That the Court award Liberty its costs of suit incurred in this action; and
- 5 4. That the Court award such other and further relief as it deems just and proper.\
- 6

7 DATED: September 5, 2007

WILLOUGHBY, STUART & BENING

8
9 By: 

ALEXANDER F. STUART
Attorneys for Defendant,
LIBERTY MUTUAL FIRE INSURANCE
COMPANY

13 **DEMAND FOR JURY TRIAL**

14 Defendant Liberty Mutual Fire Insurance Company hereby demands trial by jury as allowed
15 by Rule 38 of the Federal Rules of Civil Procedure.

16
17 DATED: September 5, 2007

WILLOUGHBY, STUART & BENING

18
19
20 By: 

ALEXANDER F. STUART
Attorneys for Defendant,
LIBERTY MUTUAL FIRE INSURANCE
COMPANY